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ABSTRACT

This report presents conclusions of a special New York State task force, The Professional Education Project, which examined the 1992 MacCrate Report on legal education and professional development in terms of its usefulness to the State. Part 1 of this report presents the results of surveys of 15 New York law schools, 158 law firms, 28 public sector organizations, and 13 providers of continuing legal education. For law schools, the report reviews instruction in lawyering skills and professional values, and offers examples of approaches presently in use at each of the State's law schools. For law firms, the report covers skills that first-year associates bring with them, the existence of formal training programs at the law firms, training after the first year, and whether the firm has a professional development coordinator. Part 2 evaluates the state's current continuum of legal education. Findings are reported concerning the need for expansion of skills and values instruction, constraints on skills and values instruction, under-utilized resources, procedures for admission to the Bar, and training and professional development after admission to the Bar. Finally, Part 3 presents recommendations for further action concerning each of the above areas. (Contains 27 references.) (DB)

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LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT IN NEW YORK STATE

— REPORT OF THE PROFESSIONAL EDUCATION PROJECT

JUNE 1996

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Dedication

This report is dedicated to the memory of Dean W. Haywood Burns who, as the Vice-Chair of the Professional Education Project, gave the Project and the legal community of this State the benefit of his great wisdom and unflagging energy.

THE PROFESSIONAL EDUCATION PROJECT

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* *Note*: The Appendices are separate from the main report and can be obtained upon request from the Unified Court System, Communications Office, 270 Broadway, New York, N.Y. 10007, tel.: 212-417-5900.

Introduction

In 1992, a Task Force formed by the American Bar Association's Section of Legal Education and Admissions to the Bar – formally known as the "Task Force on Law Schools and the Profession: Narrowing the Gap" but more commonly known as the "MacCrate Task Force," after its chairperson, former ABA President Robert MacCrate – issued a report on the state of legal education and post-graduation training of members of the bar. The "MacCrate Report" set forth a detailed inventory of the fundamental skills and professional values needed for competent practice as well as an ambitious blueprint for ensuring that new members of the profession would have adequate opportunities to acquire these essential skills and values. *See* AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) (hereafter "MacCrate Report"). Rejecting a view of the process of professional development as consisting of formal stages with clear divisions, the Report emphasized that "legal educators ... and practicing lawyers ... are engaged in a common enterprise: ... the development of the skills and values of competent and responsible lawyers along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer's professional career." Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. LEGAL EDUC. 89, 89 (1994). The Report culminated in a lengthy list of detailed recommendations for implementation of the Task Force's vision. *See* MacCrate Report, *supra* at 327-38.

In the three years since the MacCrate Report was issued, it has been a major topic of study and discussion by legal educators and state and local bar associations throughout the country. Law schools have re-examined their curricula, often adopting significant reforms in the ways in which professional skills and values are taught. State and local bar associations have devoted considerable attention to improving the opportunities for professional development after law school. Moreover, taking to heart the MacCrate Report's emphasis on coordinated effort, the academy and bar of several states have come together in conferences, conclaves, or committees to plan integrated approaches to improving the state's network of professional development services.

In 1994, in response to a recommendation by a delegation of representatives of the New York State bar and legal education community, the Honorable Judith S. Kaye, Chief Judge of the State of New York, concluded that a committee should be formed in New York State to consider the implications of the MacCrate Report for legal education and professional development in the state.

As Chief Judge Kaye explained at the time,

> In New York State, there is a particular need to create ... [a] new forum in which we can collectively consider the important issues raised by the MacCrate Report. This is so for two reasons: (1) unlike many other states, New York lacks a unified bar and instead has some 160 bar associations, and (2) while some states have only a few law schools -- or just one at the state university -- New York has fifteen accredited law schools. Given this situation, a state-wide committee drawn from the bar, law schools and bench seems in order ....

The committee, formally designated "The Professional Education Project," was created in April 1994. The Honorable Joseph P. Sullivan of the Appellate Division, First Department, was appointed the Chair of the committee, and Helaine M. Barnett, Attorney-in-Charge of the New York Legal Aid Society's Civil Division, and the late W. Haywood Burns, Dean of the City University of New York Law School, were designated the Vice-Chairs. To assist the committee in its work, Chief Judge Kaye appointed three distinguished consultants: Professor Curtis Berger of Columbia School of Law, a former President of the Association of American Law Schools; Robert MacCrate, a former President of the American Bar Association and Chair of the Task Force on Law Schools and the Profession: Narrowing the Gap; and Norman Redlich of Wachtell Lipton Rosen & Katz, formerly the Dean of N.Y.U. School of Law and Corporation Counsel of the City of New York.

Explaining that she was "imply[ing] neither endorsement nor rejection of the myriad particular proposals presented in the MacCrate Report," Judge Kaye charged the Professional Education Project with "consider[ing] how the ideas raised by the MacCrate Report might help New York's diverse, dynamic legal profession build on its long traditions of service to clients and the public as we approach the twenty-first century." She suggested that the committee consider, among other things, the following specific matters:

- Is there a "gap" between legal education and the practice of law in New York State?
- Are particular deficiencies in skills or values prevalent?
- If legal education is properly to be conceptualized as an ongoing, cooperative venture amongst the law schools and practicing bar, are there weak points in the present continuum of professional development in New York? Do any such weaknesses affect the bar generally,

or especially those at a certain point in their careers or those who pursue particular career paths?

- What can be done to shore up any weaknesses in the educational continuum, so New Yorkers may have their myriad legal needs addressed by the ablest, most well prepared attorneys? What types of efforts are most likely to be successful, and which groups are best suited to take the lead in implementing them?

From the time of its formation in April 1994 to the present time, the Professional Education Project has met on a regular basis to study the issues identified by Judge Kaye. In order to gather data about the state's current continuum of legal education and professional development, the committee divided into subcommittees. The Law Schools Subcommittee, chaired by Dean Rudolph C. Hasl of St. John's University School of Law, gathered information about the course offerings of each of the 15 law schools in the state. The Law Firms Subcommittee, chaired by Sheila L. Birnbaum of Skadden Arps Slate Meagher & Flom, conducted a survey of law firms throughout the state regarding the training opportunities available to partners and associates. The Public Sector Subcommittee, chaired by Helaine M. Barnett, Attorney-in-Charge of the Legal Aid Society's Civil Division, conducted an equivalent survey of public interest law organizations throughout the state. The Continuing Legal Education Subcommittee, chaired by Andrew J. Simons of Farrell Fritz Caemmerer Cleary Barnosky & Armentano, gathered information about the State's commercial and not-for-profit providers of continuing legal education, studied the experiences of other states that have adopted mandatory continuing legal education requirements, and examined the history of proposals to implement a requirement of this sort in New York State. The Bar Examination Subcommittee, chaired by Richard J. Bartlett of Bartlett Pontiff Stewart Rhodes & Judge and a member of the New York State Board of Law Examiners, gathered information about the role of the Bar Examination within the educational continuum, examining both the experience within the State and in other states.

In their study of the Bar Examination and the bar admissions process generally, the Bar Examination Subcommittee and the entire Committee were assisted by two special consultants: Joseph D. Harbaugh, Dean of Nova Southeastern University Shepard Broad Law Center, one of the country's experts on the subject of bar examinations; and Laura Taylor Swain of Debevoise & Plimpton, a member of the State Board of Law Examiners. Sidney Gribetz, the Executive Secretary of the First Judicial Department's Committee on Character and Fitness of Applicants for Admissions to the Bar also assisted the Professional Education Project by providing information regarding the bar admissions process.

This report presents the unanimous views and recommendations of the Professional Education Project. The report begins by presenting the results of the surveys conducted by the Project. Parts I(A), I(B)(1), I(B)(2), and I(B)(3) set forth, respectively, the data generated by the surveys of law schools, law firms, public sector organizations, and providers of continuing legal education. Thereafter, Part II of the report evaluates the state's current continuum of legal education, examining whether there are gaps in the continuum and then considers whether there are improvements that should be made. Finally, Part III presents a series of recommendations for further action.

I.

Survey of the Continuum of Professional Development in New York State

A. Law Schools

(1) Methodology Employed to Examine the Current State of Instruction in New York Law Schools

The Law Schools Subcommittee began by developing a survey instrument that would:

- ascertain the courses that each school in the State has developed to teach the professional skills and values identified in the MacCrate Report;
- explore job placement and career patterns of law students, including not only employment upon graduation but also summer and term-time employment; and
- inquire about limitations on the schools' ability to teach skills and values.

A copy of the survey instrument is included in Appendix A.

Each member of the subcommittee was assigned to contact representatives of particular schools to solicit the information and to prepare a report on the responses.

In order to ensure effective communication about law school programs, the subcommittee developed a set of definitions and descriptions of terms used to describe particular pedagogical methodologies for skills and values instruction. While such instruction may take a wide variety of forms, it generally is characterized by the following pedagogical features:

> [S]tudents are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problem in role; the students are required to interact with others in attempts to identify and solve the problem; and, perhaps most critically, the student performance is subjected to intensive critical review.

Report of the Committee on the Future of the In-House Clinic, 42 J. LEGAL EDUC. 508, 511 (1992). *See also* Anthony G. Amsterdam, *Clinical Legal Education – A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

As the subcommittee found in its discussion of types of skills courses, there are numerous terms in circulation. For the sake of simplicity and consistency, the subcommittee decided to use the terminology employed in the MacCrate Report, which styles the three distinct modes of instruction as follows: "clinics, externships, and simulations." The Report defines these terms as follows:

Clinic:	Programs which involve students in representing actual clients under the supervision of law school teachers.
Externship:	Courses or programs in which students are placed with non-law school agencies or offices.
Simulation:	Programs which use simulation exercises to teach interviewing, counseling, negotiation, trial practice, etc.

MacCrate Report, *supra* at 238 n.3. These definitions are based on the ABA's instructions to law schools which accompany its annual questionnaire. They are basically consistent with the definitions of these terms that appeared in the 1980 Report of the Association of American Law Schools (AALS)/American Bar Association Committee on Guidelines for Clinical Legal Education.

(2) Results of the Survey of Law Schools

(a) Instruction in Lawyering Skills

This overview does not attempt to summarize the numerous courses which each of the surveyed schools offers in the area of professional skills. Courses which deal with such subjects are often named in different ways and combine different skills. Appendix A contains detailed descriptions of the various schools' course offerings, along with enrollment information.

As one would expect, each of the law schools devotes extensive attention to teaching the skills traditionally taught in law school: legal analysis and legal research. With respect to legal analysis, most of the law schools have enriched traditional instruction in case interpretation and doctrinal analysis by using interdisciplinary approaches to provide students with a broader perspective and a deeper understanding of the rule of law and the manner in which it is applied. With respect to legal research, the schools offer instruction in traditional research methodologies as well as computerized data access. The law library resources of the New York State law schools are in the upper range nationally of law libraries, both in terms of the quality of their collections and their uses of technology.

Each of the law schools also seeks to teach problem-solving and communication skills, although the nature and quality of the instruction varies among schools. With respect to problem-solving, some of the schools conceptualize this skill solely in terms of traditional legal analysis while other schools employ a broader model that includes the conceptual processes by which lawyers impose order upon an unstructured fact pattern presented by a client and develop a plan for solving that client's problem.

With respect to oral and written communication skills, each of the schools offers some instruction in these skills to first-year students and also provides upper-level students with opportunities to write scholarly papers in substantive law courses and to employ oral advocacy and writing skills in clinical courses. Some schools have gone further by focusing heavily on legal writing in the first year (including, in some cases, providing students with opportunities to draft trial-level pleadings rather than solely appellate briefs) and offering advanced courses that specifically focus on legal writing.

The law schools also vary considerably with respect to the quantity and quality of courses that address the other skills identified by the MacCrate Report as fundamental to the practice of law. Most schools have developed upper-year electives to introduce students to the skills of factual investigation, counseling, negotiation, and alternative dispute resolution. Some schools have taken the important additional step of providing such instruction to all students in the first year of law school and offering opportunities to students to increase their understanding of these skills in upper-level electives.

At each of the schools, students have the opportunity to participate in clinics, externships, and simulation courses, which provide instruction in the full range of lawyering skills. In most of the law schools, however, there are not enough clinical teachers and courses to offer such instruction to all of the students who seek to enroll. Even in those law schools in which the clinics are large enough to accommodate most of the students who seek enrollment, students are often limited to participating in only one such experience. In many of the schools, moreover, there has not been a significant effort to go beyond the limited number of clinical courses by integrating professional skills instruction in substantive law courses.

Furthermore, professional skills instruction tends to focus primarily on litigative skills, devoting relatively little attention to the skills needed for transactional and other non-litigation settings. For example, instruction in legal writing tends to concentrate on the litigation context. Even in those schools that offer courses in drafting in a transactional setting, those courses generally are electives rather than part of the mandatory first-year curriculum.

Of the skills identified by the MacCrate Report as fundamental, one skill that generally is not covered in law school is the organization and management of legal work. Although students in clinical courses are exposed to basic management issues, the clinics generally do not seek to teach the skill of practice management as a specific objective of a clinical course. Some schools offer structured transitional education programs to introduce students to basic management issues.

(b) Instruction in Professional Values

The ABA Standards for the Approval of Law Schools require that law schools provide all students with "instruction in the duties and responsibilities of the legal profession ... [including] the history, goals, structure and responsibilities of the legal profession and its members." ABA Standard 302(a)(iv). The importance of this aspect of legal education is underscored by the fact that this is one of the only areas in which the ABA Standards specify not merely that a law school must offer a certain type of course but that the law school must require all students to take the course.

In accordance with the Standards, all law schools of the State offer a course in professional responsibility that focuses on the relevant professional standards and ethical decision-making. The law schools vary considerably, however, in the extent to which they exceed this required minimum level of instruction in professional responsibility. Some schools have expanded their coverage of the subject by offering additional courses or by consciously focusing on ethical issues in substantive law and clinical courses. A number of schools have supplemented their professional responsibility courses with mandatory *pro bono* programs, optional "Pro Bono Students" (PBS) programs, other forms of public service opportunities, or extracurricular programs or lectures.

(c) Examples of Approaches Presently in Use in the State's Law Schools

In surveying the courses that the State's law schools use to teach lawyering skills and professional values, the subcommittee was struck by the diversity of approaches and the high level of creativity evident at several of the schools. Although the extent of resources committed to skills and values instruction varies considerably among schools, resulting in variations in the ambitiousness, scope, and sophistication of the resulting programs, it is readily apparent that all of the State's schools have endeavored to expand their offerings in these areas. The following discussion will illustrate this point by describing some of the course offerings that can be found around the State. More detailed descriptions of each of the following programs can

be found in Appendix A.

(i) Albany Law School's Government Law Center

Albany Law School provides students with opportunities to study and participate in the operation of state government through clinical courses and through its Government Law Center. The Center involves students in interdisciplinary research into problems facing governments and public policy analysis in selected issue areas. The Albany Law School takes advantage of its location in the state capital, facilitating clinical work, externships, and other interaction with government agencies.

(ii) Brooklyn Law School's Externship Program

Brooklyn Law School offers an ambitious externship program, in addition to its in-house fieldwork clinics, which serves most members of a graduating class. One of the externships is a Civil Clinic, which places students in various offices under the supervision of a staff attorney in that placement. Among the public offices engaged in the program are the Civil Divisions of the U.S. Attorneys for the Southern and Eastern Districts, the S.E.C., the N.Y. State Attorney General's Office, the N.Y. City Corporation Counsel, and the Legal Aid Society. Students are grouped into subject clusters, *e.g.*, Entertainment Law, Regulatory Law, Environmental Law, Poverty Law and Government Litigation, and work with adjunct specialists as well as a full-time faculty member.

(iii) Cardozo Law School's Innocence Project Clinic

Cardozo Law School's Innocence Project Clinic is nationally known for representing prisoners who claim that DNA evidence will establish their innocence. Students handle the prisoners' cases from investigation through evidence testing and the preparation of motions and memoranda in courts throughout the country. In the seminar component of the clinic, students learn about various forensic DNA techniques (RFLP and PCR-based tests) that can be used to exonerate prisoners wrongfully convicted.

(iv) Columbia Law School's "Profession of Law" Course

Columbia Law School has created a course entitled "The Profession of Law," which is taught on an intensive basis during the first week of the fall semester and is required for all third year students. The goals of the course are to introduce students to the rules that govern professional conduct; help them develop an analytic framework for making ethical decisions in those broad areas where the rules do not give clear answers; provoke them to think about what it means to be an ethical practitioner; and help them explore the relationship between their personal morality and professional ethics. Much of the course is taught in small

sections, where professors and experienced practitioners work together to provide a rich learning environment for the students. Through the use of a wide variety of pedagogical techniques, including extensive simulations, lectures, faculty demonstrations and written assignments, students are able to fully address both the theoretical and practical aspects of the issues involved.

(v) Cornell Law School's Legal Aid Clinic

Cornell Law School offers a substantial clinical program as well as externship opportunities and a range of simulation courses. A succession of "Legal Aid" clinical courses, for instance, involves students in increasingly complex representation of clients, primarily in civil cases, with close supervision by clinical faculty. Students begin by focusing on interviewing, counseling, advocacy, and professional role issues, then move to more advanced pretrial and trial matters, including case planning, fact investigation and discovery, pleadings, and negotiation. Client representation in the Legal Aid Clinic is supplemented by a classroom component, which also includes students from other clinical courses such as the "Government Benefits Clinic" and the "Women and the Law Clinic."

(vi) CUNY Law School's Third-Year Program

Since opening its doors in 1983, CUNY has been a leader among those schools which seek a thoughtful integration of theory and practice. From their first year, where students are taught lawyering through the use of extensive simulations, through the third year, where students work with real clients, the emphasis on skills and values is a constant. Of particular note is CUNY's third-year program in which students are required to participate in either an in-house, live-client clinic or a "concentration." CUNY's "Concentration Program" represents a development in law school pedagogy designed to integrate theory and practice through intensive academic work coordinated with carefully supervised fieldwork.

(vii) Fordham Law School's Public Service Programs

Fordham Law School has created a variety of opportunities for students to participate in public service activities while in law school. In addition to the kinds of law-related public interest opportunities that can be found at other law schools – representation of indigent clients in clinics, externships, and *Pro Bono* Students Program internships – the school assists students in finding non-law related work. This includes, for example, volunteer work in soup kitchens, collection and distribution of clothing to the poor, and assistance in the construction of homes under the auspices of Habitat for Humanity. As a result, over 700 Fordham students participate in some form of public service each year. The school's Stein Center for

Ethics and Public Interest Law supports students' public interest law work by awarding fellowships and summer stipends and by sponsoring symposia and conferences on public interest law issues.

(viii) Hofstra University Law School's Simulation Courses

Hofstra University School of Law offers a rich variety of live client clinical courses, simulation courses and externships as well as an extensive Pro Bono Volunteer program. The Law School's simulation courses are particularly innovative. For example, in Pretrial Litigation, students are divided into law firms representing clients in complex civil litigation; the course makes extensive use of a computer based electronic mail system to facilitate communications among students, instructors, clients and the outside world. Trial Techniques is an intensive, simulation-based course covering every aspect of a trial from jury selection to closing argument. During the course, students are given an opportunity to try two complete cases, one of which is argued before a jury. Additional simulation courses include Advanced Appellate Advocacy and Advanced Trial Techniques: Use of Expert Witnesses.

(ix) New York Law School's "Workshop" Courses

New York Law School has integrated skills instruction and a focus on the perspective of the practicing lawyer into substantive law courses by adding "workshop" components to seminars in areas such as individual rights, corporate law, copyright, bankruptcy, criminal law and procedure, employment law, immigration law, environmental law, and alternative dispute resolution. These courses allow students to address strategic and ethical issues, along with more usual questions of law, fact, and policy, in the context of traditionally defined bodies of law. Most of these courses involve supervised field placements in settings within the relevant body of law and some employ simulations. In addition to these "seminar and workshop" courses, the school also offers an in-house fieldwork clinic and various simulation courses in lawyering skills. All students are required to take a one-semester lawyering course in the first year.

(x) N.Y.U. School of Law's Sequential Clinical Curriculum

New York University School of Law has developed a multi-tiered, sequential curriculum of clinical courses that students can take throughout their three years of law school. All first-year students take a full-year lawyering course, which provides a basic understanding of problem-solving in a legal context and the skills of interviewing, counseling, negotiation, informal advocacy, and litigation. Those students who wish to develop

greater proficiency in lawyering skills and to study the theory of legal practice can elect to take more advanced simulation courses in their second year and in-house fieldwork clinics in the third year. Upper-level students also can participate in the Lawyering Theory Colloquium, an interdisciplinary seminar that brings together clinical law professors, other members of the faculty, law students, and professionals from other disciplines to explore issues in lawyering theory and practice.

(xi) Pace Law School's Domestic Violence Clinic

Pace University School of Law has created a Prosecution of Domestic Violence Clinic. The Clinic is an attempt to develop sophisticated, humane approaches to the prosecution of low-level domestic violence complaints. Many such complaints currently fall through the cracks of the justice system. However, if properly handled, these cases may provide opportunities to disrupt the cycle of domestic violence before more serious harm occurs. Through the Clinic, students work with an experienced member of the District Attorney's Office and a law professor, who combine their talents to provide students with intense litigation supervision and academic reflection. Students in the Prosecution of Domestic Violence Clinic participate in simulation exercises with students in the school's Criminal Defense Clinic. These exercises enable students from both clinics to learn the lawyering skills they need to handle their fieldwork cases properly.

(xii) St. John's University Law School's Transitional Education Programs

St. John's University School of Law, in coordination with its Alumni Association, has sponsored since the Spring of 1994 a series of Transitional Education Programs for third and fourth year law students and recent graduates. In recognition of the fact that many graduates start their careers in a small firm setting or in solo practice, the programs are designed to assist participants in developing fundamental skills in the areas of wills and trusts, real estate, estate administration, elder law, civil and criminal litigation and employment and labor law practice. (These topics were selected on the basis of a survey of recent graduates in solo or small firm practice regarding the information they would have liked to have had in order to deal with clients or issues in the first year of practice.) The programs, which are held in both the fall and spring semesters and are offered free of charge, are organized and taught by graduates of the school.

(xiii) SUNY Buffalo Law School's "New Curriculum"

The "New Curriculum" of the State University of New York at Buffalo School of Law attempts to equip students for the practice

of law -- not just to "think like lawyers" but also to "work like lawyers." It places analytical skills development in a range of practical contexts and teaches students how to learn on their own at a high level of sophistication. For first-year students, intensive "bridge" courses offer applications of the law in specific problem areas. For second- and third-year students, concentrations are available in particular areas of study or practice, including designated courses, qualifying exams, colloquium seminars, and a clinical or simulated practice component for each concentration. Students in concentrations receive faculty guidance in building a portfolio of writing samples and videotaped oral presentations that demonstrate a range of professional skills. Faculty and practitioners teach short courses on particular legal topics to enrich concentrations or provide breadth in emerging legal areas. As the New Curriculum evolves, research institutes or clusters will be used to encourage collaborative problem-solving.

(xiv) Syracuse College of Law's Applied Learning Program

Syracuse College of Law recently established an Applied Learning Program ("ALP") to coordinate and link its various curricular initiatives and better prepare students for the practice of law. Integrating theory and doctrine with policy, skills, and values, the ALP adds the innovation of Applied Learning Centers to the established clinical and Law Firm programs. Third-year students can enroll in one of several Centers to undertake interdisciplinary work in a particular problem area, often in conjunction with other schools and departments in the university and with experienced practitioners. The ALP seeks to replicate the successful model of its Law, Technology, and Management Program, now in its fourth year, involving engineering, management, and law students in the Technology Transfer Research Center and its development of application of new technologies. The Syracuse faculty aims to guarantee an applied learning experience to every third-year student from its array of offerings.

(xv) The Evening Clinic of Touro College, Jacob D. Fuchsberg School of Law

With the growing importance of clinics as a pedagogic method, many of the law schools have sought ways to expand the number of students who can enroll in these courses. In addition to increasing the number of clinical offerings, the schools have tried to attract a broader spectrum of students. For example, because clinical courses are usually taught during regular business hours, night students generally are precluded from taking them. In order to address this problem, Touro College's Jacob D. Fuchsberg School of Law has created the International Human Rights Asylum Litigation Clinic. In this clinic, students

do all of their client-representation work in the evening hours, including interviewing clients and witnesses, reviewing evidence, and meeting with faculty supervisors.

(d) Job Placement and Career Patterns of Law Students

The diversity of the New York law schools is mirrored in the variety of jobs that their graduates take upon graduation. Not unexpectedly, the survey revealed that graduating law students avail themselves of the full spectrum of opportunities in the employment market, including: judicial clerkships, private practice (from solo practitioner to large firm private practice), government work, non-government public interest practice, in-house corporate counsel, non-law-related work and academia.

The employment patterns of the students of the New York law schools differ sharply, depending upon the school from which the student graduates. Specifically, although two of the schools send over 50% of their graduates to large firms, all of the others send between a third and one-half of their graduates into either solo practice or a firm with no more than 10 lawyers. Similarly, while on average it appears that approximately 10% of all graduating students enter government service, the percentage sent by individual schools ranges from approximately 1.5% to 22%.

B. Education and Professional Development After Law School

(1) Survey of Law Firms

(a) Methodology

The Law Firms Subcommittee developed a questionnaire to ascertain:

- the extent and types of training that law firms provide to new associates;
- the extent and types of ongoing training opportunities that are made available to more experienced attorneys at the firm;
- the firms' perception of the extent to which law school prepares graduates for the kinds of tasks they are expected to perform in practice; and
- the firms' assessment of the extent to which the Bar Examination assesses skills relevant to practice.

A copy of the questionnaire can be found in Appendix B.

Eight hundred (800) questionnaires were distributed to firms of all sizes across the state. 158 (20%) were completed and

returned. Fourteen (2%) were returned to sender, unopened. Of the returned, completed questionnaires, 13% were from solo practitioners; 59% were from firms with a total number of attorneys between two and ten; 16% were from firms with between eleven and twenty-five attorneys; 4% were from firms with between twenty-six and one hundred attorneys; and 7% were from firms with a total number of attorneys that exceeded one hundred. Five percent of the firms that responded had only one partner (but were not solo practitioners); 64% had between two and ten partners; 11% had between eleven and twenty-five partners; 3% had between twenty-six and one hundred partners; and 3% had over one hundred partners.

(b) Findings of Survey of Law Firms

(i) Skills that first-year associates bring with them as a result of law school education and term-time and summertime working experiences

The firms that responded to the questions about first-year associates' skills (which generally were the firms with more than 10 attorneys) stated that law school tends to prepare first-year associates to perform legal research. While writing was cited by some as a strong suit, an equal number of firms found associates' writing skills to be disappointingly poor. Almost all firms agreed that first-year associates lack nuts-and-bolts experience such as drafting documents and interacting with clients. One firm (26-100 attorneys) said that new associates are "unprepared to make clear, unique vocal decisions and recommendations." Another firm (11-25 attorneys) echoed this sentiment, adding that new associates are "prepared least to make sound judgments in evaluating the merits and likely outcome of a case and expressing those views orally and in writing." Another firm in the category of 11-25 attorneys stated that "we don't hire out of law schools anymore because we've been unable to train ... [associates] effectively in a satisfactory time frame."

In response to the question about the types of law school instruction that the firms look upon favorably in hiring new associates, the firms that hire associates directly out of law school (which tended to be firms with more than ten attorneys) stressed practical experience (moot court, trial teams, clinics), strong writing skills (journal experience) and courses in the area of the firm's practice. The firms with more than 100 attorneys seem less concerned with the practical skills of an interviewee, perhaps because these firms tend to have formal training programs for new associates; for these firms, the priority appears to be substantive courses in the intended area of practice.

(ii) Existence of formal training programs at the law firms

In response to the question whether the firm has "a formal training program for new associates that teaches skills and substantive areas of law (as distinguished from an orientation program that introduces new lawyers to firm practices and procedures)," the substantial majority of smaller firms said that they do not have such a program. However, virtually all of the firms with over 100 attorneys answered that they have formal training programs.

Of the large firms that reported that they have a formal training program, there was an even split between those that have a "uniform program for all associates" and those in which the programs vary by department. In the latter group, the larger departments have organized programs while the smaller departments tend to have informal training. Of the minority of smaller firms that have a formal program, the program generally was uniform since these firms generally do not have departments.

In those large firms that have branch offices, the branch offices have the opportunity (or the obligation) to participate in training.

The courses vary from firm to firm. As a rule, they were described as substantive in the areas of the firms' practice, combined with skill-related topics such as the taking of depositions and negotiation. In response to a question about the availability of skills training for non-litigators, the middle-sized and large firms reported that such training is provided "on the job" or through CLE classes, speaker presentations or publications.

In most of the firms that offer formal training programs, subjects are taught throughout the first year. The stated goal of these programs is to provide the associates with a solid grounding in the substantive areas handled by the firm. One firm of over 100 attorneys reported, however, that it had found that it is impossible to match training to needs and therefore formal training is limited to one week of introductory classes, following which the associates are expected to "jump in" to the work at the firm. Legislative updates and current legal developments and issues are dealt with primarily through luncheon lectures and seminars.

Appendix B contains samples of the syllabi for law firm education programs that were submitted by some of the firms that responded to the questionnaire.

(iii) Training after the first year

Of the firms that responded to questions about training after the first year (which tended to be firms with more than 10 attorneys), the respondents generally indicated that such training tends to be minimal and informal. The larger the firm, the greater the opportunities for continuing education. Firms with between 11 and 100 attorneys said that courses are generally taught by partners and other associates; one-on-one supervision is the most common form of ongoing education. Firms with more than 100 attorneys are more likely to use videotapes and CD-Rom educational tools in addition to live presentations, demonstrations and simulations by both outside consultants and other lawyers within the firm. In addition to seminars and meetings about new legislation and other current issues, ongoing training appears to offer opportunities to hone skills, such as litigation skills and oral advocacy skills.

In response to a question about the availability of training for partners in "substantive areas, as distinguished from marketing, business development and communications skills," the firms with fewer than 100 attorneys generally responded that they do not offer any "formal training" of this sort or simply said that the question is inapplicable. Firms with more than 100 attorneys listed more opportunities, such as monthly luncheons, meetings with featured speakers and presentations, reading journals and attending seminars. However, in all of the firms, partner training seems to be primarily self-initiated.

There were two questions that addressed the role of clients in training: "Do lawyers ever attend training seminars conducted by clients for the client's personnel?" and "Do clients ever come to the firm to lecture on client-specific topics?" The overwhelming response to both questions was "no." A few firms responded positively to either one of the two questions or both of them.

(iv) Professional development coordinator

Generally, the firms with fewer than 100 attorneys responded to the question "Does the firm have a professional development coordinator?" by either saying they do not or that the question is inapplicable to them. Some of the larger firms in this category stated that a partner or department head is responsible for professional development.

The firms with more than 100 attorneys were evenly divided between those that have a professional development coordinator and those that do not. In the firms that employ a coordinator, the coordinators tend to be lawyers who report to a training committee. Of the firms that responded, only one firm employs a full-time coordinator. With respect to the other firms that had

coordinators, these coordinators spend an average of 20% of their time on this position. The coordinators spend the rest of their time working on matters such as evaluations, human resources, and summer and first-year associate programs and policies. In the firms of over 100 attorneys that do not have a coordinator, partners or a recruiting director are responsible for professional development.

(v) Continuing legal education

Although all of the firms were supportive of the idea of sending lawyers to bar association continuing legal education (CLE) programs as well as CLE programs offered by organizations other than the bar associations, both the larger and smaller firms expressed reservations. With respect to the bar association programs, some of the larger firms felt that the programs are often too basic or geared towards less sophisticated practices; a number of the smaller firms commented that these programs tend to be most useful for younger associates. With respect to the non-bar programs, the larger firms again were less enthusiastic, saying that they encourage attendance selectively. One attorney commented that the programs are "not cost effective ... [and that] audio tapes and written materials are much better."

Responses to the question "Approximately how many hours a year does each lawyer devote, on average, to continuing legal education?" varied somewhat by size of firm. Solo practitioners' responses ranged from 3 to 60 hours, with an average of 25 hours. Firms with between two and ten attorneys reported 10 to 100 hours, with an average of 20 hours. Firms with eleven to twenty-five attorneys ranged from 5 to 100 hours, with an average of 35 hours. Firms with twenty-six to one hundred lawyers gave responses ranging from 10 to 150 hours, with an average of 25 hours. Finally, firms with more than 100 lawyers stated that the lawyers tend to devote anywhere from 5 to 75 hours, with an average of 35 hours.

(vi) Training for summer associates

With respect to the question "What type of instruction does your office give to summer associates?," firms with fewer than 100 attorneys generally responded that the question is inapplicable to them. To the extent that these firms hire summer associates, instruction is informal: Following an initial orientation session, training tends to be hands-on, case-specific, and provided by supervising attorneys and mentors.

Of the firms with more than 100 attorneys, the largest of these firms have more formalized training programs for summer associates. Associates generally learn two or three substantive skills, study writing and research, attend training seminars and

"tag along" with senior associates and partners.

(vii) Firms' perceptions of the Bar Examination

In response to the question "Does the Bar Exam provide an accurate test of a student's ability to practice law at your firm?," most firms responded that it does not.

(2) Survey of Public Sector Organizations

(a) Methodology

The Subcommittee on Public Sector Organizations set out to obtain information about training for attorneys in public sector organizations throughout the State. The term "public sector organization" was defined broadly to include all not-for-profit law-related organizations as well as government law offices such as state prosecuting attorneys' offices, the United States Attorneys' offices, and the Office of the Attorney General.

The subcommittee devised a questionnaire that would produce roughly the same categories of information as the law firm survey, although adapted to unique aspects of practice in the public sector. The questionnaire covered the following areas:

- The extent and types of training that are provided to new attorneys.
- The extent and types of ongoing training opportunities that are made available to more experienced attorneys.
- The organizations' perception of the extent to which law school prepares graduates for the kinds of tasks they are expected to perform in practice.
- The organizations' assessment of the extent to which the Bar Examination assesses skills relevant to practice.

A copy of the questionnaire is included in Appendix C.

Thirty-nine questionnaires were sent. Twenty-eight responses were received, representing a return rate of greater than 70%. Appendix C contains a list of the organizations that were sent the questionnaire, those that responded, and those that stated that the questionnaire was inapplicable because of either the size of the organization or the nature of its work.

(b) Findings of Survey of Public Sector Organizations

With respect to the preparation that new attorneys receive in law school, there appeared to be general agreement that law

school graduates are best prepared to perform research and writing tasks. The general consensus seemed to be that graduates are least well prepared to demonstrate competency in other legal skills. Particular skills identified were negotiation skills, case management skills, investigative skills, conducting depositions, client interviewing, and trying cases. The latter observation is somewhat tempered by the view that where students had been exposed to law school clinics as a part of their legal education, they were a great deal less deficient in their skills performance area.

With respect to the Bar Examination, most of the respondents to the survey commented that the Bar Examination does not provide an accurate assessment of a law school graduate's preparedness and ability to practice law in their organizations or his or her readiness to practice in court.

On the issue of formal training once an attorney has been hired by a public sector organization, the responses varied by the size of the organization. Large organizations tend to have formal training programs for newly hired attorneys. Middle-sized and small public interest agencies generally do not have formal training programs and tend to rely to a much greater extent on on-the-job training.

In addressing the questions relating to continuing legal education, two of the most important issues seemed to be the cost of such instruction and the relevance of the subject matter covered by continuing legal education courses. Each of these factors were cited by organizations as reasons for deciding that their attorneys should not participate in particular programs.

Respondents recommended that continuing legal education programs be revised to rely more heavily on simulations and role playing rather than lectures. Respondents also urged greater diversity of trainers. Areas of need not currently covered include management and supervisory training and a generally available course on legal and general writing. In addition, non-litigators emphasized the need and importance of computer skills and investigative skills.

The respondents reported that they take advantage of a wide range of continuing legal education opportunities, extending well beyond commonly employed or "mainstream" programs like those offered by the Practicing Law Institute and the State Bar Association. For example, respondents noted that they have sent attorneys from their offices to national training programs, including ones offered by the National College of District Attorneys, the NAACP Legal Defense Fund Lawyers Training Institute, and the Department of Justice's Office of Legal Education and Advocacy Institute. Typically, however, such uses of national training programs tended to be limited to larger

governmental organizations, which are in a position to afford their attorneys the time and resources to take part in such training. A suggestion was made that it would be very helpful if there were a publication listing all training opportunities, organized by subject matter.

It was suggested that law schools can make a useful contribution to post-law-school training by holding symposia on discrete subjects and on recent substantive developments in the law. It was also suggested that a consortium of law schools might be formed for this and related purposes. Another suggestion was that law schools could maintain a file on graduates who are willing to participate in training, with indications of their areas of expertise. In addition, it was noted, there could be greater use of law school faculty in outside training programs.

Finally, a suggestion was made that public sector organizations could expand and enhance training opportunities by pooling their resources and conducting joint training exercises and programs. An example of such inter-organization cooperation that has taken place is the trial advocacy program that is jointly sponsored by the Manhattan District Attorney's Office and the Legal Aid Society's Criminal Defense Division.

(3) Overview of Continuing Legal Education

The Continuing Legal Education Subcommittee communicated with bar associations and law schools in an effort to determine what CLE programs are regularly made available to members of the New York bar. The subcommittee also reviewed materials of national CLE providers to help complete the picture.

Bar association CLE is led by the considerable number of courses offered by the New York State Bar Association and, in New York City, a number of courses offered by the Association of the Bar of the City of New York. On the county association level, the most prolific is the New York County Lawyers, followed by the Nassau County Bar Association Academy of Law. Eleven other county bar associations responded to the Subcommittee, indicating a full calendar of programs. Overall, bar associations provide more than 200 courses annually. These courses often include opportunities to participate in or observe mock trials or other types of simulation exercises.

With respect to law schools, Fordham, Albany, St. John's, Pace and Touro each provide a series of CLE courses. SUNY Buffalo, in conjunction with other co-sponsors, offers an annual transitional education for new attorneys. Of the law schools that responded to the Subcommittee's inquiries, a total of 70 CLE courses was listed.

On the national level, three major nonprofit providers are involved in extensive CLE programming: Practising Law Institute; American Law Institute-American Bar Association Committee on Continuing Professional Education; and the American Bar Association. Because of its location in New York, PLI provides the greatest number of courses in New York, numbering approximately 100 annually. In addition to the numerous commercial providers which offer CLE courses in New York on an *ad hoc* basis, several commercial groups (including, for example, New York Law Journal Seminars Press, Aspen Law and Business, Executive Enterprises and American Conference Institute) provide programming in New York on a regular basis.

In attempting to assess the content of CLE programs, the Subcommittee examined the course lists of the various providers. As a general matter, bar associations and law schools tend to focus on state-level topics while the national groups concentrate on federal law topics. The most prevalent substantive law topics deal with matrimonial, estate planning, real estate, negligence and criminal law. All providers offer skills training, including practice management courses. Generally, the skills training tends to focus on court practice and trial practice.

The programs offered by national groups are generally aimed at large law firms and corporate legal departments. The heavy programming emphasis is in the corporate and commercial law areas.

Fees for CLE courses in New York range from under $100 to as much as $1,000. (These figures are generally for programs extending from one to two days.) As a general matter, the national providers of both commercial and not-for-profit continuing legal education tend to be in the upper end of the range, while the local and county bar associations and law schools tend to fall on either side of the $100 figure. New York State Bar Association courses typically tend to be $130 for members and $175 for non-members. The three major not-for-profit providers all offer scholarships. The Practising Law Institute, for example, provides 2,000 full and 1,000 partial scholarships annually.

The Subcommittee found that CLE providers have prepared and offer subscribers a wide selection of books and video and audio cassettes that appear to be useful for training in CLE.

The Subcommittee did not attempt to study, in any comprehensive way, the extent to which on-site training is available. It appears that on-site or in-house training is generally utilized only by larger law firms, corporate law departments, large public interest law organizations and government agencies.

Despite the large size of the State, there is very little CLE programming provided by satellite. Only one organization provides regular satellite coverage to several cities within the State. It appears that the major cities in the State attract the largest number of courses.

Additional information about the State's CLE providers can be found in Appendix D, which lists CLE courses offered by bar associations, the Practising Law Institute, certain proprietary providers, and the law schools.

II.

Evaluation of the State's Continuum of Legal Education and Professional Development

A. During the Law School Years

(1) The Need for Expansion of Skills and Values Instruction

An evaluation of the current state of law school instruction in skills and values appropriately begins with an examination of the role that law schools should play in preparing their graduates for the practice of law. As expressly recognized in the American Bar Association Standards for Accreditation of Law Schools, law schools have an affirmative obligation to "prepare [graduates] ... to participate effectively in the legal profession." ABA Standard 301(a) (as amended on August 10-11, 1993, in response to the issuance of the MacCrate Report). Similarly, the Bylaws of the Association of American Law Schools (AALS) recognize that law schools are obliged to "assure that [their] students ... are academically qualified to participate effectively and responsibly in the legal profession." AALS Bylaw 6-9(b) (as amended, January 7, 1995).

This is not to say, of course, that the law schools either could or should seek to fully prepare students to practice competently upon graduation. As the MacCrate Report recognizes, a three-year course of instruction cannot possibly suffice to teach lawyers all they need to know to represent clients competently. *See* MacCrate Report, *supra* at 4 ("It has long been apparent that American law schools cannot reasonably be expected to shoulder the task of converting even very able students into full-fledged lawyers licensed to handle legal matters."). At the same time, however, the law schools cannot overlook the fact that, in many cases, large numbers of their graduates begin representing clients upon graduation and successful completion of the bar admissions process – without significant practical experience and without the benefit of any skills and values instruction other than that which they received in law school. *See* Part I(A)(2)(d) *supra*. Accordingly, the law schools have an obligation to the profession, the law students themselves, and the students' future clients, to ensure that the students graduate with a certain degree of proficiency in the most important lawyering skills and an understanding of fundamental professional values.

Thus, the legal academy has a duality of mission that is also characteristic of graduate schools in other fields of professional education: to prepare graduates for effective practice while still providing the kind of intellectually stimulating and academically rigorous course of instruction that

is essential for an institution of higher learning and essential to excellence in practice. In this regard, the MacCrate Report provides a vital insight about legal education: that, as has been demonstrated by the clinical legal education programs that have emerged in law schools over the course of the past two decades, the teaching of skills and values can be every bit as intellectually challenging and academically rigorous as other subjects traditionally covered in law school. *See* MacCrate Report, *supra* at 233-41. By integrating theory with practice, such courses provide an intellectual and social context that is essential for effective instruction in lawyering skills and values and that conveys a deeper understanding of the nature of practice.

The MacCrate Report proposes, and the Professional Education Project endorses, a model of professional development that views the three years of law school as laying a foundation of minimum familiarity with the most important lawyering skills and values so that students can refine their understanding of these skills and values during their years of practice. Building on the conceptual framework provided during the law school years, transitional education and continuing legal education programs play a critical role in continuing the process of teaching the skills and values that lawyers need to attain first a level of competence and eventually a level of excellence. Moreover, assuming that law schools teach students the essential skill of learning from experience, lawyers can productively engage in self-instruction, extracting from each experience the all-important lessons for improving one's performance in the future. *See* MacCrate Report, *supra* at 218-20; Amsterdam, *supra* at 616 (the years that law school graduates spend in practice "will provide by far the major part of the student's legal education ... *if* the law schools undertake as a part of their curricula to teach students effective techniques of learning from experience").

As Part I(A) *supra* explains, the survey of the state's law schools showed that the legal education community has made a significant commitment to the teaching of skills and values. All of the State's schools have gone beyond the traditional focus on legal analysis and legal research to teach other fundamental lawyering skills and all of the schools offer instruction on professional responsibility. Some of the schools have devoted substantial resources to providing extensive, high-quality instruction in skills and values. Particularly in clinical courses, but also in a valuable way in simulation courses and well-conceived externships, these schools prepare students for practice in a manner that is simultaneously theoretical and practical.

Yet, as also demonstrated by the survey of the law schools as well as by the surveys of the law firms and public sector

organizations, there is still far more that needs to be done if the law schools are to fulfill their responsibility for preparing their graduates for legal practice. The law school survey revealed that at least some of the State's schools still conceptualize skills instruction primarily in terms of teaching students legal analysis and research, to the detriment of other, also important skills such as problem-solving, communication, factual investigation, counseling, negotiation, alternative dispute resolution, and the skills needed in transactional and other nonlitigation settings. Moreover, at many schools, skills instruction is rarely, if ever, addressed in substantive law courses. Although the clinical faculty at many of the state's law schools have developed outstanding programs for teaching lawyering skills (some of which are described in Part I(A) *supra*), most schools have only a few clinical teachers on their faculty and so only a small percentage of the student body can benefit from clinical courses.

The situation is largely the same with respect to the teaching of professional values. Some schools have devised highly innovative approaches to teaching professional responsibility and for educating students in their *pro bono* obligations. *See* Part I(A) *supra*. However, many of the schools have been satisfied with merely meeting the ABA Standards' minimal requirements for the teaching of professional responsibility and have not done enough to fashion effective means to teach students about the fundamental values of the profession. *See also* COMMITTEE ON THE PROFESSION AND THE COURTS, FINAL REPORT TO THE CHIEF JUDGE 21-22 (November, 1995) (hereafter cited as "Craco Committee Report"). *See generally* Robert B. McKay, *What Law Schools Can and Should Do (and Sometimes Do)*, 30 N.Y. L. SCH. L. REV. 491, 509-10, 514 (1985); Norman Redlich, *Law Schools as Institutional Teachers of Professional Responsibility*, 34 J. LEGAL EDUC. 215 (1984).

The effects of these curricular and resource decisions by law schools are evident in the comments of the law firms and public sector organizations that responded to the survey questionnaires. Both the law firms and public sector organizations reported that they generally find that the only skills that new graduates bring with them are legal research and writing skills. These law school graduates typically have little or no familiarity with or understanding of the skills of negotiation, fact investigation, interviewing, discovery, counseling, litigation, and alternative dispute resolution and the skills needed in a transactional setting. Survey respondents noted that students who participated in law school clinical courses have greater proficiency in the broader range of lawyering skills. (Although the survey did not distinguish among types of clinical courses, this comment would appear to encompass not only fieldwork clinics but also well-conceived simulation courses and externships as well.) The surveys of the law firms

and public sector organizations make it apparent, however, that the students graduating with such preparation are a relatively small proportion of the graduates of the State's law schools.

For these reasons, the Professional Education Project strongly recommends that each of the State's law schools re-examine its curriculum to determine whether the school adequately teaches the skills and values needed for effective participation in the legal profession and whether the skills and values instruction offered by the school has been sufficiently integrated into the entire law school experience, including both first-year courses and upper-level substantive courses. *See* AALS Bylaw 6-9(b) ("A member school shall provide ... significant opportunities ... for instruction regarding client representation."); AALS Executive Committee Regulations, Regulation 7.3(b) (in addition to offering instruction in "legal research, written and oral communication, and critical analysis of primary legal materials," law schools "are encouraged to offer ... instruction in dispute resolution, planning and problem solving, drafting, and counseling"); AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS ("WAHL COMMISSION REPORT") 23-26 (August 3, 1995).

A certain amount of critical evaluation of this sort took place at many of the State's schools in the wake of the issuance of the MacCrate Report in 1992. In response to survey questions about reactions to the report, most of the schools stated that the Report was provided to faculty members and students, as well as to alumni/alumnae and others, and that the report was discussed in meetings of the full faculty or curriculum committees. Yet, it appears that several of the schools have had their drive towards curricular reform thwarted by financial or other impediments.

The next subsection of this report will examine some of the primary obstacles to expansion of skills and values instruction within law schools. Thereafter, the report will identify some of the assets available to law schools that presently are under-utilized in at least some schools.

As the discussion will indicate, one of the important assets available to the law schools is the practicing bar. The bar shares responsibility with the law schools for ensuring that new members of the profession receive the training and preparation they need for effective practice. *See* MacCrate Report, *supra* at 216 (Professional Value § 3.2). The discussion will indicate some of the ways in which the bar can play a significant role in enhancing and supplementing the instruction that law schools are currently providing.

The Professional Education Project has refrained from recommending specific changes in law school curricula or calling for particular types of law school course offerings. As the MacCrate Report observes, "[e]xcellence [in law school instruction] cannot be promoted by the kind of standardization involved in formulating any particular list of prescriptions and prerequisites"; "[i]t is best supported by encouraging pluralism and innovativeness in legal education and practice." MacCrate Report, *supra* at 132. The description of innovative approaches in Part I(A)(2)(c) serves as a graphic testimonial to the virtues of allowing law schools to experiment with different approaches as they pursue their own unique visions and priorities. But, however a law school may choose to structure its curriculum, it must pursue the goal of "prepar[ing] [graduates] ... to participate effectively in the legal profession." ABA Standard 301(a). At the very least, this means providing an adequate number and variety of courses on skills and values integrated with the core curriculum.

(2) Constraints on Skills and Values Instruction

(a) Financial Constraints

Several of the Deans and Associate Deans interviewed in the survey commented on the cost of expanding professional skills and values instruction. Courses in which students are expected to develop communication, negotiation, counseling, dispute resolution, drafting and other professional skills often require a low student-faculty ratio to provide pedagogically sound instruction. Historically, legal education has involved relatively large classes, with student-faculty ratios in excess of 30:1 not uncommon. Equivalent ratios for other graduate and professional education would generally be well below 10:1; undergraduate ratios will often be at the level of 10:1 or lower. Through efforts by the ABA and AALS accreditation processes, student-faculty ratios have been lowered in the past ten years, so that a law school is presumptively out of compliance with the standards if the ratio exceeds 30:1. Although this has produced ratios in their teens at a few schools, most schools still have ratios in the mid-twenties.

Considerable thought needs to be given to ways to enrich current instruction in professional skills and values in a cost-effective manner. For example, it may be possible to expand the number of students who can participate in clinical and other practice-oriented courses by making greater use of well-conceived and carefully structured simulation courses and externships and other innovative teaching methodologies; by drawing more extensively on adjunct teachers and student assistants; and by better integrating computers and other technology.

Most law schools will also need to consider modifications in physical facilities to accommodate small group instruction. Large lecture halls are not particularly conducive to the type of instruction methodologies that are needed for skills instruction.

(b) Court Rules

Some of the existing rules of the Court of Appeals constrain experimentation and innovation in the development of professional skills during law school. Rule 520.3(c)(5), in particular, has constricted professional skills instruction by limiting the number of semester hours that students can devote to clinical courses. Although the rule recently was modified to expand somewhat the number of clinical credits that are permitted, the rule still has an overall effect of limiting student participation in clinical courses and discouraging curricular reforms to expand clinical offerings. The attempt to distinguish between clinical and other courses does not recognize the differences in skills instruction which are described earlier in this report and the degree to which students are rigorously supervised in live-client experiences. The rule also fails to recognize the widespread integration of clinical approaches into the core curriculum and the close relationship of theory and practice in legal education.

Another impediment to expansion of professional skills instruction is created by Rule 520.3(d)-(e), which, as interpreted by Court staff, requires each student to enroll in a course schedule involving four days of classes per week in order to satisfy the rule. While it may be appropriate to establish requirements for the length of a semester and the number of class hours students must attend over the span of a semester, a rule framed in terms of the number of days per week of on-campus class attendance has the effect of limiting opportunities for live-client experiences that require extended time away from campus.

(3) Under-utilized Resources

(a) Adjunct Faculty

As indicated earlier, the use of adjunct faculty may offer at least a partial solution to the problem of how to expand professional skills courses at a time of limited resources. In addition to the existing use of adjuncts as teachers of traditional and skills courses, practitioners and judges could play a more modest but highly valuable role by assisting full-time faculty members in teaching traditional and skills courses. For example, in substantive law courses, occasional guest lectures by adjuncts or role-plays supervised by adjuncts would provide a skills focus that is now often lacking. In simulation courses, practitioners and judges can assist in overseeing and critiquing simulations, thereby expanding the number of students

who are served. In fieldwork clinics, practitioners similarly can assist clinical teachers in supervising students' fieldwork practice.

Although ABA accreditation standards impose some restrictions on the use of adjunct teachers, such integration of adjunct teachers into existing traditional and skills courses is perfectly consistent with the standards. ABA Standard 403 provides:

> The major burden of the educational program and the major responsibility for faculty participation in the governance of the law school rests upon the full-time faculty members.
>
> Students shall receive substantially all of their instruction in the first year of the full-time curriculum or the first two years of the part-time curriculum, and a major proportion of their total instruction from full-time faculty members.
>
> The proper use of qualified practicing lawyers and judges as part-time faculty members is an appropriate means of enriching the educational program.

Thus, the Standard itself recognizes the propriety of using practitioners and judges to enrich an educational program.

While the approach suggested here allows a law school to make use of the special expertise and unique perspectives of practitioners and judges, it is essential that the law schools provide these adjunct teachers with guidance on effective teaching techniques, particularly those that have been developed in recent years by clinical legal educators for teaching in a simulation setting. Moreover, to the extent possible, adjunct faculty members should be made a part of the academic community and integrated into the learning and teaching environment. *See* AALS Executive Committee Regulations, Commentary to Regulation 7.1 (as amended, January 13, 1995) ("when schools use adjunct faculty they have an obligation to establish effective procedures to govern their selection and evaluation and to orient them into the law school culture and what is expected of them").

(b) Students' Summertime and Term-time Employment Experiences

During the law school years, students are often exposed to the practice of law through summertime and term-time employment with law firms and public sector law offices. However, with the exception of law school career service assistance in finding summertime and term-time jobs for students, the law schools generally have not been involved in the nature of the experiences

that students receive.

As the MacCrate Report recognizes, an effective continuum of professional development requires that the law schools and the practicing bar work together, treating "the development of lawyers as a common enterprise ... [in which] legal educators and practicing lawyers have different capacities and opportunities to impart to future lawyers the skills and values required for the competent and responsible practice of law." MacCrate Report, *supra* at 330. Through effective collaboration of this sort, the time that students spend in summertime and term-time employment can be structured to enhance the instruction students receive while in law school. For example, discussions between law school faculty and supervising attorneys at law firms and public sector law offices could be helpful in identifying methods to allow students to develop skills and values, consistent with the employers' interests in a productive use of resources. Moreover, the State's Bar Associations could create and present seminars and workshops for those students without summer jobs or whose firms do not offer training programs. Finally, the schools could assist students by engaging them in a reflective evaluation of their work experiences.

(c) Technology

The refinement of computer technology has several important implications for professional skills instruction. First, new methods for networking computers make it much easier for law professors to communicate with students outside of class and for students to communicate with each other. As a result, class-wide discussions can continue after class; professors can provide individualized comments to students about their performances in simulations; and fieldwork supervisors can relay comments on drafts of motions or witness examination questions. Particularly in clinical courses, which tend to require extensive one-on-one contact between professors and students, this new technology facilitates instruction by enabling professors to communicate with students when one or both parties are away from school.

Second, computer-assisted legal instruction programs can facilitate professional skills instruction. In substantive law courses, such programs can be used to teach basic doctrine so that a greater portion of the course can be devoted to other matters, including the theory of practice. Similarly, in clinics, computer-assisted instruction can be used to provide students with cut-and-dry information about local law and procedure so that the valuable resource of class time can be reserved for intellectually challenging aspects of skills instruction.

Third, there has been a steady growth in and refinement of interactive computer programs to teach lawyering skills. While

some of these programs are still relatively unsophisticated, they are improving at a rapid rate. These programs may make it possible for clinical teachers to teach a greater number of students and for substantive law course teachers to add skills components to their courses.

Although these technological developments thus may improve and perhaps even reduce the costs of skills instruction, they entail significant start-up costs. A law school has to expend resources to purchase the technologies and back-up support and then to train faculty members in the proper use of the new technologies. In addition, considerable faculty time will be required to devise the most effective ways to use the new technologies to teach skills and values.

B. Procedures for Admission to the Bar

Law school graduates (and non-graduates who have met the "clerkship" requirements of Court of Appeals Rule 520.4) seeking admission to the New York bar are required to take the New York State Bar Examination. A substantial proportion of the candidates sitting for the examination have attended law school outside New York State: 2,709 of the 7,719 candidates who took the July 1994 Bar Examination were from out-of-state law schools, and another 751 of the candidates for that examination had studied outside the United States.

The New York State Bar Examination has been the subject of extensive study and debate in recent years. *See* NEW YORK STATE BAR ASSOCIATION TASK FORCE ON THE PROFESSION, REPORT OF THE TASK FORCE ON THE PROFESSION (January 16, 1995) (hereafter "Fales Report") (approved, in modified form, by NYSBA House of Delegates, November 1995); JASON MILLMAN, WILLIAM A. MEHRENS & PAUL R. SACKETT, AN EVALUATION OF THE NEW YORK STATE BAR EXAMINATION (May 1993) (study commissioned by the New York State Court of Appeals) (hereafter "Millman Report"); Committee on Legal Education and Admission to the Bar, Association of the Bar of the City of New York, *Report on Admission to the Bar in New York in the Twenty-First Century — A Blueprint for Reform*, 47 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 464 (June 1992) (hereafter "City Bar Association Report"). *See also* MacCrate Report, *supra* at 277-84 (describing similar debates about the Bar Examination throughout the country).

With rare exception, even critics of the Bar Examination agree that an examination of some sort is a necessary screening device to protect the public and to safeguard the integrity of the profession. Insofar as it possible for testing mechanisms to accomplish this end, Bar Examinations seek to screen out professional incompetence at the point of entry into the profession and to guarantee a certain minimum level of

professional competence on the part of those who are licensed to practice.

Inevitably, however, there are limits to the capacity of any test to accomplish these ends. Certain qualities cannot be tested by any examination. Certain people, due to styles of learning or test taking skills or both, do not test well even though they might be excellent lawyers if permitted to practice. The degree of correlation between performance on a Bar Examination and lawyering ability is difficult to measure because of the lack of a control group: Since individuals who fail the Bar Examination are not permitted to practice, there is no empirical basis possible for assessing whether some or even all of these individuals might nonetheless be capable of providing effective legal representation.

One of the central recommendations of those groups that seek to revise the Bar Examination is the adoption, as part of the Bar Examination, of "performance tests" or other types of devices that assertedly evaluate lawyering skills more effectively than traditional bar examination questions. *See, e.g.*, MacCrate Report, *supra* at 280-82; Fales Report, *supra* at 21, 25; City Bar Association Report, *supra* at 524-26. The National Conference of Bar Examiners has recently decided to offer a multistate version of the type of performance test currently used in California. While it may well be that performance tests are superior to traditional Bar Examinations, critics of existing performance test instruments have pointed out that:

> [I]n large measure th[e]se performance tests focus on (albeit by a different method and more fully) the same lawyering skills of legal analysis and reasoning and written communication that are measured by the traditional examinations. They do not go nearly as far as they might to test the additional lawyering skills identified in the [MacCrate] Task Force's Statement of Skills and Values.

MacCrate Report, *supra* at 282. We have been informed that the New York State Board of Law Examiners is presently in the process of attempting to develop mechanisms to evaluate a broad range of the skills that are essential foundations for competent practice. The Professional Education Project endorses this goal and recommends that the Board continue its efforts.

In addition to the difficult issues surrounding style of testing, questions have been raised about the number and selection of subjects to be tested on the Bar Examination. In recent years, the State Board of Law Examiners has reduced the number of subjects covered on the New York Bar Examination. *See* Millman Report, *supra* at 2-1. Yet, even with the reduction, the State's Bar Examination still covers a large number of subjects.

See id. at 2-1 & n.1. *See also* MacCrate Report, *supra* at 277-78 (citing New York State Bar Examination as an example of the large number of substantive law areas that some States choose to include on the Bar Examination). The City Bar Association Report strongly recommended a reduction in the number of substantive law areas covered on the New York State Bar Examination. *See* City Bar Association Report, *supra* at 521-22.

A reduction in the number of subjects tested on the Bar Examination would increase the flexibility that law schools have to shape their curricula. Since students tend to take courses in those areas that will be tested on the Bar Examination – even if those courses are not mandated – a school that wishes to satisfy student demand must necessarily offer courses on each of the Bar Examination subjects.

Moreover, the number of subjects tested on the Bar Examination has implications for students' willingness to take courses that teach skills and values. Even assuming that law schools increase the extent to which they offer skills instruction in substantive law courses (*see* Part II(A) *supra*), such courses rarely will provide the type of intensive focus on conceptual aspects of lawyering skills that simulation courses and clinics are able to attain by concentrating primarily on the skills themselves rather than substantive law. Thus, if the Bar Examination tests a large number of subjects and if students driven to fill up their schedules with enroll in substantive law courses on each of these subjects, they will have relatively little time left over for simulation courses, clinics, and externships.

For these reasons, the Professional Education Project recommends that the State Board of Law Examiners give serious consideration to further reducing the number of substantive areas tested on the New York State Bar Examination.

Thus far, the discussion has focused solely on the New York State Bar Examination. Law school graduates who wish to practice law in the State of New York also must pass the Multistate Professional Responsibility Examination (MPRE), which is prepared by the National Conference of Bar Examiners. The test "is intended to measure knowledge and understanding of established ethical standards." National Conference of Bar Examiners, 1995 Information Booklet on the Multistate Professional Responsibility Examination 27 (1994). The test consists of 50 multiple-choice test questions that focus on the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct. *See id.* at 28. The narrow subject matter focus of this examination appears to be inconsistent with the broad formulation of professional values that is found in the MacCrate Report. *See* MacCrate Report, *supra* at 203-21. *See also id.* at 135-36 (explaining that the Report's "analysis of professional values

recognizes that 'training in professional responsibility' should involve more than 'just the specifics of the Code of Professional Responsibility and the Model Rules of Professional Conduct'; it should encompass 'the values of the profession,' including 'the obligations and accountability of a professional dealing with the lives of and affairs of clients'" (quoting Robert B. McKay, *What Law Schools Can and Should Do (and Sometimes Do)*, 30 N.Y. L. SCH. L. REV. 491, 509-10 (1985)). The Professional Education Project understands that the National Conference of Bar Examiners has under consideration a proposal to broaden the coverage of the MPRE to include the values of the profession, well beyond knowledge of the Model Code and Model Rules. We support this development. We believe that such a revision of the MPRE is essential for an effective evaluation of law graduates' understanding of professional responsibility. We also recommend that the State Board of Law Examiners consider including professional responsibility as a subject to be tested on the New York State Bar Examination.

Thought should also be given to ways to revise the bar admissions process to ensure that new lawyers appreciate that civility is an essential part of professionalism. As the Committee on the Profession and the Courts recently observed, lawyers and even judges often engage in inappropriate incivility, needlessly disrupting court proceedings and "erod[ing] society's respect for, and confidence in, the law" and the legal system. Craco Committee Report, *supra* at 28-31. *See also* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON PROFESSIONALISM, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES (August 1995) (Resolution adopted by ABA House of Delegates, August 1995) ("Resolved, That the American Bar Association encourages federal, state, territorial and local bar associations and courts to adopt standards of civility, courtesy and conduct as aspirational goals to promote professionalism of lawyers and judges."); *Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 441 (1992); Nassau County Bar Association, *A Lawyer's Creed of Professionalism*, NASSAU LAWYER SPECIAL EDITION: 1995-1996 ASSOCIATION GUIDE 4, 14-16 (1995). The Craco Committee has recommended that

> the Unified Court System ... adopt a code of conduct, similar to those promulgated by the American College of Trial Lawyers and the United States Court of Appeals for the Seventh Circuit, that will reorient the bar and bench toward the observance of courtesies that long have enhanced the quality of professionalism in New York .. [and that] will form a frame of reference to assist both bench and bar in discerning the bounds of civility among other things.

Craco Committee Report, *supra* at 29. Assuming that the Unified Court System does adopt such a set of "aspirational goals" (Report of ABA Standing Committee on Professionalism, *supra*), the

Professional Education Project recommends that the bar admissions process accord appropriate attention to ensuring that new members of the profession are familiar with, and subscribe to, these aspirational goals.

The Professional Education Project furthermore recommends that the Deans of the New York law schools and the members of the Board of Law Examiners meet annually to review issues of common concern and to share information relevant to the bar admissions process. Information about skills and values testing used in the law schools and summaries of topics covered in law school courses would be helpful to the examiners. Information about Bar Examination coverage and grading would be helpful to the law school deans.

Any efforts to change the Bar Examination should take into account the financial impact on those who take the examination. The number of Bar Examination review courses -- and specialized supplementary workshops -- appears to be constantly increasing, as is the ultimate cost for those who attempt to maximize their chances of passing the examination by taking as many supplementary workshops as possible. Given the already staggering burden of debt that many law students are forced to assume, it would be highly undesirable to change the Bar Examination in ways that are likely to increase the financial strain upon students. Accordingly, if the State Board of Law Examiners decides to adopt performance testing (or an alternative mechanism for testing a wide range of lawyering skills), some thought should be given to means of revising the current process of Bar Examination preparation so that students do not feel the need to take still more supplementary bar review workshops to prepare for the new skills testing. For example, if the Law Examiners were to work together with law school deans (as well as other relevant faculty members such as clinical teachers), it may be possible to calibrate the Bar Examination to evaluate those aspects of lawyering skills that are taught in law school courses.

In considering the impact on law school graduates and the steps they take to prepare for the Bar Examination, the Law Examiners and Deans also should give some thought to devising ways to make the bar-studying process as productive as possible for the graduate's long-term development as an attorney. Given that law school graduates generally devote all of their time for a period of three months to preparing for the Bar Examination, legal educators and bar examiners have a significant interest in ensuring that, if possible, this time is used in ways that will most effectively further the individual's education and development as an attorney.

c. Training and Professional Development After Admission to the Bar

(1) The Need for Transitional Education and Subsequent Continuing Legal Education

As previously noted in Part I(A)(2)(d), the Project's survey of law schools showed that between one-third and one-half of all graduating law students begin practice either as solo practitioners or in firms with fewer than ten lawyers. These lawyers do not, with rare exception, have access to on-the-job transitional training, which is usually available only in large law firms, public sector organizations and corporate law departments *See* Parts I(B)(1), I(B)(2) *supra*; MacCrate Report, *supra* at 88-95. The pressing need for some type of transitional education program is evident.

As the MacCrate Report recognizes, all members of the legal profession have an obligation to "assist in the training and preparation of new lawyers and the continuing education of the Bar." MacCrate Report, *supra* at 216 (Professional Value § 3.2). The Report appropriately calls upon the practicing bar to "strive to make available to all new lawyers effective instruction in lawyering skills and professional values at a cost that new lawyers can afford[,] with scholarship aid provided as needed." *Id.* at 335-36.

The MacCrate Report's "Statement of Skills and Values" helps inform the initial contours of a transitional education program for new lawyers by identifying in great detail "the skills and values with which a well-trained generalist should be familiar before assuming ultimate responsibility for a client." *Id.* at 125. Of course, as the Report recognizes, "[d]ifferent lawyers will emphasize different skills ... and practitioners will often be concerned with matters outside the scope of the Statement, such as attracting and retaining clients." *Id.* But the Statement of Skills and Values provides an essential starting point by analyzing the conceptual foundations that are necessary "to practice law competently and professionally." *Id.*

The MacCrate Report identifies the following skills and values as essential prerequisites for competent and responsible practice:

Skills:

1. Problem Solving.
2. Legal Analysis and Reasoning.
3. Legal Research.
4. Factual Investigation.
5. Communication.
6. Counseling.
7. Negotiation.

8. Litigation and ADR Procedures.
9. Organization and Management of Legal Work.
10. Recognizing and Resolving Ethical Dilemmas.

Values:

1. Providing Competent Representation.
2. Striving to Promote Justice, Fairness and Morality.
3. Striving to Improve the Profession.
4. Professional Self-development.

See MacCrate Report, *supra* at 123-221. The Professional Education Project endorses this inventory of skills and values and recommends that any transitional programs in New York address these skills and values as applied to particular fields of study or practice.

Based upon the results of the Project's survey, which revealed that many graduating law students do not know how to apply their theoretical knowledge of the law in a practical context, the Project further recommends that any transitional education program include practice-oriented courses. Such courses would also provide the opportunity for new lawyers to learn and apply skills that are practice specific.

The need for continuing legal education does not end, however, with the successful completion of a transitional education program. As the MacCrate Report recognized, the kind of training that is provided at the transition stage can do little more than help a new member of the profession attain a minimum level of competence. *See* MacCrate Report, *supra* at 132 ("The Statement of Skills and Values is concerned with the limited goal of ensuring practice at a minimum level of competency"). In subsequent years of practice, lawyers have an obligation – both to their clients and to themselves – to continue refining their lawyering skills and to expand their substantive knowledge of areas of law and other fields and disciplines relevant to their practice. As Chief Judge Kaye has stated,

> The increasing codification and complexity of the law, the expansion of the law into wholly new societal areas, the heightened expectation of clients that their lawyers will know even arcane points of law of other jurisdictions in specialized areas, the new technology – all these serve to dramatize the eternal truth that ours is a profession that by its nature demands constant study in order to maintain even the barest level of competence.

Judith S. Kaye, *The Lawyer's Responsibility to Enhance Competence and Ethics*, in AMERICAN LAW INSTITUTE–AMERICAN BAR ASSOCIATION COMMITTEE

ON CONTINUING PROFESSIONAL EDUCATION, CLE AND THE LAWYER'S RESPONSIBILITIES IN AN EVOLVING PROFESSION: THE REPORT ON THE ARDEN HOUSE III CONFERENCE 55, 56 (1988).

Consistent with Judge Kaye's observation, both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct recognize that lawyers are ethically obliged to engage in continuing study and education in order to attain and maintain the requisite level of proficiency in their practice. *See* AMERICAN BAR ASSOCIATION, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-1 (1969); AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Commentary to Rule 1.1 (1983). And, echoing Judge Kaye's concern with the rightful expectations of clients, the MacCrate Report "calls upon lawyers to strive to attain the degree of expertise that may be expected of any competent practitioner at their level of experience" (MacCrate Report, *supra*, at 211-12; *see id.* at 208-09), explaining that:

> Just as a client who retains a newly admitted lawyer is entitled to expect a certain minimum level of competence, so too a client who retains a lawyer with ten years of experience is entitled to expect a level of knowledge and skill that is considerably more advanced than that of a newly admitted lawyer.

MacCrate Report, *supra* at 211-12.

Accordingly, the Project recommends that New York adopt a requirement of mandatory continuing legal education.

(2) <u>The Vehicle for Providing the Requisite Transitional Education and Continuing Instruction: Mandatory Continuing Legal Education</u>

In contemplating how to implement its proposal for mandatory continuing legal education (MCLE), the Project turned to a proposal for MCLE that was developed by a New York State Bar Association Special Committee to Consider Mandatory Continuing Legal Education, chaired by the late Dean Robert B. McKay. In the course of preparing this proposal, Dean McKay and his committee reviewed a wide range of materials (including a model MCLE rule devised by the American Bar Association), carefully examined the experiences of other states which had adopted MCLE provisions, and consulted with interested organizations and individuals throughout the State (including relevant sections and committees of the New York State Bar Association, county and local bar associations, law schools, and CLE sponsors). The McKay Commission concluded that there should be mandatory CLE. Following extensive debates which resulted in certain modifications, the State Bar Association's House of Delegates adopted a mandatory CLE proposal in 1990. Thereafter, in 1991, the proposal was endorsed in principle by the Administrative

Board of the Courts. Since that time, the proposal has been awaiting further action by either the courts or the Legislature.

The State Bar Association's proposal, a copy of which appears in Appendix E, calls for 18 hours of continuing legal education per biennial reporting period. At least two hours must be devoted to ethics and professional responsibility. Up to one-half of the remaining sixteen hours can be earned through self-study.

The Professional Education Project urges the adoption of an MCLE program, modeled on the State Bar Association's proposal, as appropriately modified to include a transitional education program. *Accord* Craco Committee Report, *supra* at 26-27; Fales Report, *supra* at 26 (Fales Committee's MCLE recommendations, which were approved by NYSBA House of Delegates on January 27, 1995).

Of course, the efficacy of any sort of transitional or continuing legal education program depends upon the quality of the educational services provided. It is readily apparent, from even the most cursory examination of CLE programs – in New York State and elsewhere – that the quality of educational services varies greatly among programs. Significantly, the State Bar Association's proposal contains provisions for ensuring the quality of programs that are certified to award CLE credit.

While oversight of curriculum is far less feasible or desirable, there are some minimum standards that should be adopted. As explained in Part II(C)(1), the transition program for new lawyers should include, at the very least, some minimum degree of training in each of the skills and values analyzed in the MacCrate Report's Statement of Fundamental Lawyering Skills and Professional Values. Indeed, this was one of the very uses that the MacCrate Task Force originally contemplated for the Statement. *See* MacCrate Report, *supra* at 128-29. Moreover, as the MacCrate Report recognizes, CLE programs for new lawyers should make use of the types of in-role interactive techniques that typically characterize clinical legal education:

> To assist new lawyers to acquire necessary skills and values, it is particularly important that providers of postgraduate legal education be encouraged to develop programs in which:
>
> - Instruction includes exercises that require students to participate actively in role.
>
> - Those training in the program have special expertise and training as teachers of skills and values.

- Teaching occurs in a context that allows students to receive immediate feedback on their applications of lawyering skills and values.

Id. at 129. *Accord*, Continuing Legal Education Committee, American Bar Association Section of Legal Education and Admissions to the Bar, Report to the Council of the Section of Legal Education and Admissions to the Bar 4 (May 27, 1994) (CLE "skills training must be interactive, not simply the traditional model of the 'talking head'").

With respect to continuing legal education programs for more experienced attorneys, any curriculum requirements should be flexible enough to permit a proliferation of courses so that attorneys can take courses in their areas of practice or related areas of interest.

Another important consideration in fashioning and implementing an MCLE program is to ensure that appropriate credit is given for existing high-quality educational programs. For example, a law school clinic or an in-house training program of a law firm or public sector organization – or a program that is jointly sponsored by the private bar and the public sector – may furnish the kinds of transitional or advanced instruction that the MCLE proposal contemplates. By giving appropriate credit for participation in such courses, the MCLE program will avoid undermining already-existing quality educational programs.

The Professional Education Project encourages the law schools to participate actively in the creation and provision of both transitional and continuing legal education programs. Several of the State's law schools have a long history of offering CLE courses. Recently, transitional education programs were offered at SUNY Buffalo Law School and St. John's University School of Law. Particularly given the sophisticated interactive teaching techniques that law school clinical teachers have developed for teaching lawyering skills, law schools have much to offer in the design and implementation of any transitional programs for new lawyers.

Beyond these broad suggestions, the Professional Education Project will not attempt to make definitive recommendations regarding the content or contours of a State plan of MCLE. The appended proposal by the State Bar Association sets forth the basic provisions of a viable MCLE plan. There may well be certain issues that are worth revisiting with the passage of time, such as:

- The appropriateness of formulating requirements that reflect the increasing need for specialization in practice.

- Mechanisms for efficiently administering the program.

- Use of technological advances.

- Whether an MCLE program can be integrated into the attorney biennial registration.

- Methods of certification compliance.

- Types of sanctions that should be imposed for failures to comply, and, if these include monetary sanctions, whether the funds collected in this manner should be allocated to the maintenance of the MCLE program.

- Mechanisms for quality control of providers and courses.

- Availability of scholarships and/or sliding scale fee arrangements for public sector attorneys and others who cannot afford to pay CLE fees.

To the extent that revisions of the State Bar's proposal may be needed on these or other issues, they are best left to a committee or other entity that is specifically focused on the subject of MCLE.

Similarly, the Professional Education Project will not attempt to analyze the best means for final consideration and adoption of the mandatory CLE program. It is worth noting, however, that a program could be adopted either through the rule-making power of the Court of Appeals and Appellate Divisions pursuant to their inherent power to regulate the licensing of practicing attorneys or through legislative action authorizing or requiring the courts to adopt an MCLE program and providing the requisite funding.

Although funding has always appeared to be an obstacle to adoption of MCLE in New York State, this need not be the case. The experience of other States demonstrates that MCLE programs can be entirely self-funded by means of fees and other charges imposed upon users. For example, California expects its MCLE program to be entirely self-funded within two years, based primarily upon fees charged to the providers and late fees charged to the members of the bar who fail to certify their compliance with the MCLE requirements. As the Fales Report indicates, one possible source of funding for an MCLE program in New York is the Attorney Licensing Fund. *See* Fales Report, *supra* at 26 (recommending the creation of an MCLE program in New York); *id.* at 36 (pointing out that only a portion of the Attorney Licensing Fund is currently used for purposes directly relating to the legal profession and recommending that the Fund be entirely allocated to "educational and disciplinary initiatives"

for the improvement of the legal profession). *See also* President's Message, 67 NEW YORK STATE BAR JOURNAL (February 1995), at 3 (statement by State Bar Association President G. Robert Wittmer, Jr., endorsing the Fales Report's recommendation and observing that "the biennial registration fees already charged generate sufficient funds to support ... a Mandatory Continuing Legal Education program"). Because of the Professional Education Project's view that the specifics of an MCLE program should be left to the entity charged with creating the program, this Report will not take a position on the appropriate source of funding. However, as the foregoing discussion has demonstrated, funding should not be viewed as an impediment to the creation of an MCLE program.

III.

Recommendations

A. *General Recommendation*

Although substantial strides have been made in recent years to improve the continuum of legal education and professional development in New York State, many aspects of the continuum are in need of further improvement. The law schools, the practicing bar, and the judiciary should work together to implement the specific recommendations for reform that are set forth in this Report and to consider what, if any, additional improvements are needed.

B. *Recommendations Relating to Skills and Values Instruction During the Period Prior to Admission to the Bar*

1. Each of the State's law schools should re-examine its curriculum to determine whether the school is adequately preparing its graduates to participate effectively in the practice of law. Among other things, the law schools should consider:

   a. Whether skills and values instruction has been adequately integrated into the entire law school experience, including both first-year courses and upper-level substantive law courses.

   b. Whether new, improved methods might be devised to teach fundamental skills and values in a theoretical and practical context.

   c. Whether the school is offering sufficient clinical courses and other types of courses on professional skills and values and, if such course offerings are not sufficient to accommodate all students who wish to take such courses and to enable students to take more than one such course if they wish to do so, how the number of courses might be expanded.

   d. Whether the school is offering sufficient opportunities for development of problem-solving and drafting skills in transactional and non-litigation settings.

   e. In those schools which do not presently offer instruction in law practice management, whether such courses should be added or whether existing courses on other subjects should be revised to include instruction in educationally valuable

aspects of law practice management.

f. Whether the school is adequately using computers and other technology to support or allow for the teaching of skills and values.

2. The law schools and the practicing bar should work together to ensure that new members of the profession receive the best possible education prior to admission to the bar. This should include:

a. Appropriate law school utilization of practicing lawyers and judges as adjunct instructors.

b. Collaboration between the law schools and the practicing bar to structure law students' summertime and term-time employment so that it will enhance the education students receive while in law school.

c. Collaboration between the law schools and the practicing bar to develop the financial resources needed to improve pre-admission instruction in the skills and values needed for competent, responsible practice.

d. Collaboration between the law schools and the practicing bar to advise law students of the skills and values they will need upon graduation in order to practice competently and responsibly.

i. The law schools of this State should consistently follow the MacCrate Report's recommendation that the "Statement of Skills and Values" be distributed to all law students so that they can use it "as an aid in preparing for practice and seeking out opportunities for professional development in their curricular planning and in their part-time or summertime employment." MacCrate Report, *supra* at 327-28.

ii. Representatives of law firms, public sector organizations, and bar associations should work with law school faculty members and law school placement offices to identify appropriate opportunities to advise students of the relevance of skills and values instruction for competent, responsible practice upon graduation. Such opportunities might include, for example, law school orientation programs for new law students and

summertime programs at the bar association for students employed at law firms and public sector organizations.

4. Court of Appeals Rules 520.3(c)(5) and (d)-(e) should be revised to facilitate the involvement of students in skills instruction and innovative curricular approaches that integrate theory with practice.

C. *Recommendations Relating to the Procedures for Admission to the Bar*

1. The Deans of the New York law schools should meet on a annual basis with the members of the State Board of Law Examiners and other relevant parties to discuss issues relating to the Bar Examination.

2. The State Board of Law Examiners should consider reducing the number of substantive areas tested on the New York State Bar Examination.

3. The State Board of Law Examiners should continue its efforts to devise and employ non-traditional testing techniques that permit effective appraisal of a wider range of lawyering skills than are tested by the traditional Bar Examination.

4. The State Board of Law Examiners should consider methods to revise the current bar admissions process so as to evaluate law school graduates' familiarity with the central values of the profession and not simply a knowledge of the Model Code of Professional Responsibility and Model Rules of Professional Conduct. Revisions might include use of an expanded Multistate Professional Responsibility Examination (MPRE) and addition of professional responsibility to the list of subjects tested on the New York State Bar Examination.

D. *Recommendations Relating to Education and Professional Development After Admission to the Bar*

1. All members of the bar should view it as their obligation to assist in the training and preparation of new lawyers.

2. A system of Mandatory Continuing Legal Education (MCLE) should be adopted in New York State.

   a. The MCLE program should be modeled in concept on the New York State Bar Association's proposal of 1991, which was formulated by the late Dean Robert B. McKay.

b. The MCLE system should possess a mechanism for overseeing the quality of continuing legal education programs that are certified to award CLE credit.

3. The MCLE program should include a transitional education program for new members of the bar to assist them in developing the skills and values needed for competent practice.

   a. The transitional education program should, at the very least, address the ten skills and four values identified in the MacCrate Report's Statement of Fundamental Lawyering Skills and Professional Values as applied to selected practice areas.

   b. The transitional education program should make use of the types of in-role interactive techniques that typically characterize clinical legal education.

4. Oversight of the curriculum of continuing legal education programs should be sufficiently flexible to permit a proliferation of courses, so that attorneys can take courses within their areas of practice or related areas of interest and so that attorneys are not forced into undue focus outside of their chosen fields of practice.

5. The MCLE program should be constructed in a manner that ensures that appropriate credit is given for high-quality continuing legal education programs offered by organizations other than commercial and not-for-profit CLE providers, including law firms, public sector organizations, and law schools.

   a. The transitional education program should provide appropriate credit for participation in law school clinics or in-house training programs of law firms or public sector organizations that satisfy some threshold requirement of quality.

   b. The continuing legal education requirement should take into account participation in in-house training programs that satisfy some threshold requirement of quality.

6. The law schools should participate actively in the creation and provision of both transitional and continuing legal education programs.

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